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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TYLO J. FELIX,

Defendant and Appellant.

A125272

(Contra Costa County
Super. Ct. No. 05-080571-3)

Defendant Tylo J. Felix was convicted of multiple counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)),¹ second degree burglary (§§ 459, 460, subd. (b)) and carrying a concealed and loaded firearm (§§ 12025, subd. (a)(1), 12031 subd. (a)(1)). The jury found true multiple firearm use enhancements, and the court found true allegations defendant had one prior serious felony conviction and one prior strike conviction (§ 667, subd. (a)(1) & subds. (b)-(i)). On appeal, he challenges only an order requiring him to pay \$500 to the county as partial reimbursement for fees incurred in his defense. The Attorney General agrees the trial court erred in ordering reimbursement absent any determination of defendant's ability to pay. Given the absence of any showing the court on remand could find this incarcerated defendant has the ability to pay and the small amount at issue, we strike the fee reimbursement order and affirm the judgment as modified.

¹ All further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

On April 17, 2009, the court sentenced defendant to 19 years in state prison. At the end of the sentencing hearing, among other fines and fees, the court ordered defendant to pay \$500 to the county as partial reimbursement for attorney fees incurred in his defense. The court also ordered defendant to be transmitted “forthwith to the California Department of Corrections” to begin serving his 19-year sentence, and he was transferred to San Quentin. The court additionally filed a “Referral to Office of Revenue Collection P.C. 987.8.” This directed defendant to report to the Contra Costa County Office of Revenue Collection (Office) within 20 days or, if in custody, to schedule an interview with the Office “within 20 working days after release from jail” to determine his ability to pay the court ordered reimbursement. (Emphasis omitted.) The referral form was not signed by defendant and listed his address in Antioch.

The Office subsequently advised the court defendant failed to report for an ability to pay assessment and recommended he therefore be ordered to pay the full amount assessed for fees. The court accepted the recommendation, ordered defendant to pay \$500 for attorney fees, and included the fee order in the abstract of judgment. Defendant filed a timely notice of appeal.

DISCUSSION

Section 987.8, subdivision (b) provides “the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost” of the legal assistance provided by the public defender or court-appointed counsel. (§ 987.8, subd. (b).) The court also “may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.” (§ 987.8, subds. (b), (d).) It is presumed, however, a defendant sentenced to state prison does not have the financial ability to pay for the cost of his defense, unless the court finds “unusual circumstances.” (§ 987.8, subd. (g)(2)(B).)

Here, the court exercised the statutory option to refer the matter to a county officer for inquiry into defendant’s ability to pay. The problem is the county officer, apparently

unaware defendant was incarcerated in San Quentin, sent notice to defendant at the Antioch address listed on the referral form. Hearing nothing from defendant, the officer recommended the court impose fees based on defendant's failure to appear, and the court did so. Defendant thus received no notice from the Office and had no hearing on his ability to pay. The trial court, in turn, made no finding of "unusual circumstances" overcoming the presumption that defendant, because he was imprisoned, lacked the ability to pay.

The Attorney General concedes error and contends the matter should be remanded with directions to the trial court to hold a hearing on defendant's ability to pay. We appreciate the Attorney General's forthright concession of error. However, in this case, given the record and small amount at issue, we conclude remand is not warranted.

Often, remand will be appropriate where the trial court fails to give notice and to hold a hearing, and thus makes no determination that "unusual circumstances" exist to warrant the requisite finding that an incarcerated defendant has the ability to pay defense fees. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1063, 1068-1069.) In *Flores*, for example, the probation report noted the defendant possessed \$1,500 worth of jewelry at the time of sentencing and had a record of stable employment. Accordingly, the Attorney General was able to make a showing on appeal that the trial court might find the defendant had the ability to pay fees. (*Id.* at pp. 1068-1069.)

Here, the Attorney General cites no comparable circumstances of defendant's financial condition at the time of sentencing, and we have found none in our review of the probation report. To the contrary, the probation report described defendant's employment history as consisting of two jobs lasting no more than two months each, and stated defendant had no financial assets. Absent "unusual circumstances," the presumption of inability to pay set forth in section 987.8, subdivision (g)(2)(B), controls. Moreover, defendant's long-term imprisonment eliminates any "likelihood that the defendant shall be able to obtain employment within a six-month period," except for the employment opportunities that prison offers. (§ 987.8, subd. (g)(2)(C).)

Thus, in this case, where the record does not suggest any likelihood the county officer or the trial court could find “unusual circumstances” exist, a remand would only generate more costs out of proportion to the fee imposed and to no avail. Given the state of the record, defendant’s 19-year prison sentence, and the minimal amount of the fee reimbursement order, we conclude remand would be a futile act and an inefficient use of limited judicial resources. We therefore, instead, strike the order imposing attorney fees.

DISPOSITION

The judgment is modified by striking the order for defendant to reimburse the county for the costs of his defense. In all other respects the judgment is affirmed.

Banke, J.

We concur:

Marchiano, P. J.

Margulies, J.